

A **MUHAMMAD HAFIZAM NORDIN & ANOR v.**
MUHAMMAD AMIRUL AZHAR RAZALI & ANOR

HIGH COURT MALAYA, JOHOR BAHRU
EVROL MARIETTE PETERS JC
[CIVIL APPEAL NO: JA-12A-13-07-2019]

B 13 APRIL 2020

C ***EVIDENCE:** Witness – Recalling of – Application by defendants – Change of solicitors for defendants – Failure to cross-examine witness on fundamental documents – Application after plaintiffs closed case – Whether defendants had ulterior motive to repair case – Whether plaintiffs would be prejudiced – Overriding factor for court in exercise of discretion – Whether interest of justice in favour of allowing recalling of witnesses – Evidence Act 1950, s. 138(4)*

D This was an appeal by the first and second defendants against the decision of the Sessions Court Judge ('SCJ') in dismissing the defendants' application ('the application') to recall witnesses pursuant to sub-s. 138(4) of the Evidence Act 1950 ('Evidence Act'). The plaintiffs' claim was for damages suffered as a result of a motor accident between the first plaintiff, riding motorcycle bearing registration number JQA 2575, and the first defendant, on motorcycle bearing registration number JQX 381. The issue was
E regarding the identity of the parties and the vehicles involved. The defendants had filed their bundle of documents containing a letter and photographs ('documents') pertaining to the accident. According to the defendants, the documents indicated that the vehicles involved were motorcycles bearing registration numbers JQA 2575 and JQC 6359, which
F was not the motorcycle ridden by the first defendant. Although the investigating officer, the first plaintiff and the second defendant ('witnesses') had testified in the Sessions Court on 1 July 2018, 3 October 2018 and 14 November 2018 respectively, they were not cross-examined on the documents, as the same were filed only on 23 October 2018. It was not
G disputed that there was a change in solicitors and the current solicitors for the defendants came on board in June 2019, after the defendant's seventh witness had given evidence, which led to the review of the case by the solicitors for the defendants. The gist of the defendants' case was that the documents were fundamental to their case, and that it was vital to recall the witnesses to examine them on such evidence to enable the court to have a
H comprehensive narrative of the case and to arrive at a just conclusion. Whereas the plaintiffs contended that the application was made too late in the day as the witnesses had already been cross-examined, and that the plaintiffs had closed their case. The plaintiffs also contended that they would

I

suffer prejudice if the application was allowed, as they would lose the opportunity to submit on the failure of the defendants to cross-examine the witnesses.

Held (allowing appeal with no order as to costs):

- (1) The right of a party to recall a witness is provided in sub-s. 138(4) of the Evidence Act. Although, ultimately it is the discretion of the judge in deciding whether to recall a witness, the overriding principle applying to such discretion is whether the interest of justice requires leave to be granted or refused. There is no rule that a court will only rarely permit the recall of a witness whose evidence is completed. Ordinarily, the interest of justice favours the grant of leave where the evidence sought to be adduced has been overlooked, and where the other party will not be prejudiced. (paras 10-12)
- (2) The recalling exercise was to examine the witnesses on evidence that they had not been cross-examined before. The defendants stated that they would not object if the plaintiffs were to recall their witnesses to rebut the evidence adduced by the defendants, provided that the calling/recalling of the witnesses was confined to their examination on liability. This demonstrated the absence of ulterior motive on the part of the defendants in any attempt to repair their case. There would be no prejudice whatsoever caused to the plaintiffs in allowing the application. (paras 21 & 22)
- (3) Subsection 138(4) of the Evidence Act provides a wide discretion to the judge to deal with cases, based on their individual facts and circumstances, and as such, the provision does not amount to a *carte blanche* for litigants to re-open their case as and when it suits them. The decision of the court has to depend on where the justice of the case lies. Regardless of the fact that the defendant had made the application at a stage after the plaintiffs had closed their case, it was not a barrier to allowing the application. (paras 24, 26 & 27)
- (4) A litigant should not be penalised for any oversight or inattention of his counsel, in this case, the defendants' previous solicitors. The doctrine requiring the evidence of a witness to undergo the test of cross-examination was not necessarily the actual cross-examination but merely an opportunity to exercise the right to cross-examine. The issue of prejudice that the plaintiffs claimed they would suffer if the application was allowed was a non-starter, in view of the fact that the defendants did not have the opportunity to cross-examine the witnesses, to begin with, since the documents were not, at that time, in their

A

B

C

D

E

F

G

H

I

- A knowledge or possession. The plaintiffs, therefore, would suffer no prejudice in real terms if this application was allowed. (paras 30, 32 & 34)
- (5) The ultimate and overriding factor that has to be considered in the exercise of discretion, is the interest of justice. Allowing this appeal to permit the defendants to recall the witnesses, would enable the court to strike a balance between both procedural as well as substantive justice, and it would allow the SCJ to analyse and examine the evidence in a comprehensive fashion before arriving at a conclusion on the defendants' liability or the absence of it. (paras 35 & 37)
- B
- C **Case(s) referred to:**
Abu Bakar Pangis & Ors v. Tung Cheong Sawmill Sdn Bhd & Ors And Another Appeal [2015] 5 CLJ 753 CA (*refd*)
Black Point Design Sdn Bhd v. Ng Lee Peng & Ors [2015] 1 LNS 946 HC (*refd*)
China Airlines Ltd v. Maltran Air Corp Sdn Bhd & Another Appeal [1996] 3 CLJ 163 FC (*refd*)
- D *Chong Keat Realty Sdn Bhd v. Ban Hin Lee Bank Bhd* [2003] 3 CLJ 532 CA (*refd*)
Jong Chuk v. Chong Tung Sang & Ors; Bacom Enterprises Sdn Bhd (Third Party) (No 2) [1999] 5 CLJ 1 HC (*dist*)
Kebing Wan & Anor v. Lembaga Pembangunan Dan Lindungan Tanah & Ors [2012] 1 LNS 1026 HC (*refd*)
- E *Ong Yoke Eng & Anor v. Lim Ah Yew* [1981] 1 LNS 162 HC (*refd*)
Pernas Trading Sdn Bhd v. Senali Construction Works Sdn Bhd & Anor [1991] 2 CLJ 1587; [1991] 3 CLJ (Rep) 439 HC (*refd*)
Prince Court Medical Centre Sdn Bhd v. Germguard Technologies (M) Sdn Bhd [2016] 1 LNS 517 CA (*refd*)
Silver Bird Group Bhd & Ors v. Dato' Tan Han Kook & Ors [2016] 1 CLJ 494 HC (*fol*)
- F *Tan Kah Khiam v. Liew Chin Chuan & Anor* [2006] 4 CLJ 715 CA (*refd*)
- Legislation referred to:**
 Evidence Act 1950, s. 138(4)
For the appellants - JS Naicker; M/s Naicker & Assocs
For the respondents - Teo Han Ley; M/s Teo & Assocs
- G *Reported by S Barathi*

JUDGMENT

Evrol Mariette Peters JC:

H The Appeal

- [1] This is an appeal ("this appeal") by the first and second defendants ("the defendants") against the decision of the learned Sessions Court Judge ("SCJ") on 21 July 2019 in dismissing the defendants' application ("the application") to recall witnesses pursuant to sub-s. 138(4) of the Evidence Act 1950 ("the Evidence Act").
- I

The Brief Facts

[2] In the Sessions Court, the plaintiffs' claim was for damages suffered as a result of a motor accident along the Senai-Desaru Highway on 2 August 2015, between the first plaintiff riding motorcycle bearing registration number JQA 2575, and the first defendant on motorcycle bearing registration number JQX 381.

[3] The issue was regarding the identity of the parties and the vehicles involved.

[4] The defendants had filed their bundle of documents dated 23 October 2018, containing a letter dated 27 August 2018 and photographs (collectively "the documents") pertaining to the accident. According to the defendants, the documents indicated that the vehicles involved were motorcycles bearing registration numbers JQA 2575 and JQC 6359, which was not the motorcycle ridden by the first defendant.

[5] Although the investigating officer ("SP1"), the first plaintiff ("SP3"), and the second defendant ("SP6") (collectively "the witnesses") had testified in the Sessions Court on 1 July 2018, 3 October 2018 and 14 November 2018 respectively, they were not cross-examined on the documents, as the same were filed only on 23 October 2018.

[6] I allowed this appeal, and the following are my reasons.

The Defendants' Case

[7] The gist of the defendants' case is that the documents are fundamental to their case, and that it is vital to recall the witnesses to examine them on such evidence, to enable the court to have a comprehensive narrative of the case, and to arrive at a just conclusion.

The Plaintiffs' Case

[8] The plaintiffs' case was that the application was made too late in the day as the witnesses had already been cross-examined, and that the plaintiffs had closed their case.

[9] The plaintiffs further contended that they would suffer prejudice if the application was allowed, as they would lose the opportunity to submit on the failure of the defendants to cross-examine the witnesses.

A

B

C

D

E

F

G

H

I

A **The Law**

The Right To Recall A Witness

[10] The right of a party to recall a witness is provided in sub-s. 138(4) of the Evidence Act, which reads:

B Section 138 - Order of examinations and direction of re-examination

...

(4) The court may in all cases permit a witness to be recalled either for further examination-in-chief or for further cross-examination, and if it does so, the parties have the right of further cross-examination and re-examination respectively.

C

[11] Although ultimately it is the discretion of the judge in deciding whether to recall a witness, the overriding principle applying to such discretion is whether the interest of justice requires leave to be granted or refused. This was clarified by Arulanandom J in *Ong Yoke Eng & Anor v. Lim Ah Yew* [1981] 1 LNS 162, in the following words:

D

In civil proceedings, it is in the discretion of the court of first instance to recall a witness or call further witnesses after his case is closed. Although under ordinary circumstances it may not be necessary or permissible to allow a witness once examined and dismissed by a party to be recalled for it is expected that the advocate will interrogate him on all material points touching his case, **unforeseen situations may develop and there may be also inadvertent omissions**. In such a case the court may at its discretion allow a witness to be recalled, **but surprise or prejudice to the other party should be guarded against**. The objection by the defendant to the application was however not on these anticipated grounds. Nevertheless on allowing the application the court granted liberty to the defendant to cross-examine the recalled witness and further witnesses and call evidence in rebuttal. (emphasis added)

E

F

[12] There is no rule that a court will only rarely permit the recall of a witness whose evidence is completed. Ordinarily, the interest of justice favours the grant of leave where the evidence sought to be adduced has been overlooked, and where the other party will not be prejudiced.

G

[13] “The exercise of discretion would depend on where the justice of the case lies, having regard to the peculiar facts and circumstances before the court”: per Gopal Sri Ram JCA in *Tan Kah Khiam v. Liew Chin Chuan & Anor* [2006] 4 CLJ 715, which was adopted in *Black Point Design Sdn Bhd v. Ng Lee Peng & Ors* [2015] 1 LNS 946; [2016] 11 MLJ 839.

H

I

[14] On the other hand, sound reasons for rejecting an application to recall may be found in circumstances where counsel deliberately refrains from leading evidence when the witness is being examined-in-chief, 'in the hope of gaining some tactical advantage, or it appeared that the opposing party will suffer prejudice if leave were granted': per Muhammad Kamil Awang J in *Jong Chuk v. Chong Tung Sang & Ors; Bacom Enterprises Sdn Bhd (Third Party) (No 2)* [1999] 5 CLJ 1.

A

B

The Suitability Of Appellate Intervention

[15] Bearing in mind that this is an appeal from the Sessions Court, a factor that is pivotal to this court's consideration is the aptness of appellate intervention.

C

[16] In *China Airlines Ltd v. Maltran Air Corp Sdn Bhd & Another Appeal* [1996] 3 CLJ 163, the principles with regard to appellate intervention were distilled by the Federal Court, in the words of Mohamed Dzaiddin Abdullah FCJ, as follows:

D

However, there is clear authority that a distinction can be drawn between the finding of a specific fact which depends upon the credibility of witnesses, and a finding of fact which depends upon inferences drawn from other facts. In the latter case, an appellate Court will more readily interfere with the trial judge's findings of fact and form an independent opinion. Thus, in cases where there is no question of the credibility or reliability of any witness, or *where the point in dispute is the proper inference to be drawn from proved facts, an appeal Court is generally in as good a position to review and evaluate the evidence as the trial Judge.*

E

(emphasis added)

[17] 'In examining an appeal against a decision made upon a finding of fact, an appellate court would carry out an examination of the reasoning in respect of the finding of fact, in the light of all of the evidence before the trial court': per Abdul Wahab Patail JCA in *Abu Bakar Pangis & Ors v. Tung Cheong Sawmill Sdn Bhd & Ors And Another Appeal* [2015] 5 CLJ 753.

F

Contentions And Findings

G

[18] The reasons given by the learned SCJ for dismissing the defendants' application were that it was too late in the day for such application, and that recalling the witnesses would cause prejudice to the plaintiffs. The learned SCJ had also stated that sufficient efforts were not made to obtain the relevant evidence before the witnesses were cross-examined.

H

I

A [19] After scrutinising the reasons provided by the learned SCJ, I am of the opinion that he had not assessed the merits of the defendants' application. As such, the dismissal of the defendants' application was not justified. I am guided by the Court of Appeal in *Tan Kah Khiam v. Liew Chin Chuan & Anor* (*supra*), where it was stated by Gopal Sri Ram JCA (as he then was):

B Counsel for the defendants argued that the trial judge having exercised her discretion not to permit the plaintiff to reopen his case, we should not interfere with her discretion. But what counsel overlooks is that *this is a case in which the judge has given no reasons for exercising her discretion in the way in which she did. So we cannot really gauge what it is that operated on her mind when she dismissed the plaintiff's application to reopen his case.* This is accordingly
C a stronger case than one in which reasons are given. Were it otherwise, a judge at first instance will be able to insulate the exercise of his discretion from review by giving no reasons at all. That is not and cannot be justice according to the law.

(emphasis added)

D [20] Counsel for the plaintiff contended, on the basis of *Prince Court Medical Centre Sdn Bhd v. Germguard Technologies (M) Sdn Bhd* [2016] 1 LNS 517, that allowing the application would amount to giving the defendants a second bite at the cherry, to repair their case.

E [21] In my view, that was not the case, as the recalling exercise would be to examine the witnesses on evidence that they had not been cross-examined before. Furthermore, allowing the application would cause no prejudice whatsoever to the plaintiffs, bearing in mind that in the course of these proceedings, counsel for the plaintiffs had indicated that if the defendants were allowed to recall the witnesses, there may be a need for the plaintiffs
F to do the same to rebut the evidence adduced by the defendants during the recalling. To this, counsel for the defendants responded that he would not object, should such application be made by the plaintiffs, provided that the calling/recalling of such witnesses is confined to their examination on liability only.

G [22] This, in my view, demonstrated the absence of ulterior motive on the part of the defendants in any attempt to repair their case. Counsel for the defendants was candor in his explanation for applying to recall, as it was undisputed that there was a change in solicitors, and that the current solicitors for the defendants had only come on board in June 2019, after the
H defendants' seventh witness had given evidence. This led to a review of the case by the solicitors for the defendant.

I [23] The plaintiffs further argued that allowing the application would create a precedent for litigants to change solicitors as a tactical move to rehabilitate their case, especially if it was on a slippery slope.

[24] I find the plaintiffs' contention untenable, in view of the fact that a wide discretion is given to the judge in sub-s. 138(4) of the Evidence Act to deal with cases, based on their individual facts and circumstances, and as such, the provision does not amount to *carte blanche* for litigants to re-open their case, as and when it suits them.

A

[25] A subsequent issue that arose is the stage at which the application was made. Counsel for the plaintiffs in relying on *Pernas Trading Sdn Bhd v. Senali Construction Works Sdn Bhd & Anor* [1991] 2 CLJ 1587; [1991] 3 CLJ (Rep) 439, submitted that the application should not be allowed as it was made after the plaintiffs had closed their case.

B

[26] I am mindful that the stage at which the application is made is a factor that should be considered. However, ultimately, the decision of the court has to depend on where the justice of the case lies, and this can only be done after considering each case, based on its distinctive facts and circumstances.

C

[27] Therefore, regardless of the fact that the defendants had made the application at a stage after the plaintiffs had closed their case, it is not a barrier to allowing the application, as demonstrated in *Silver Bird Group Bhd & Ors v. Dato' Tan Han Kook & Ors* [2016] 1 CLJ 494, where the court, after reviewing all the relevant authorities, stated:

D

From the cases above, **the courts have a wide discretion to recall witnesses after the case is closed**, where the application is based on unforeseen circumstances which may develop or that there may be inadvertent omissions, subject to issue of surprise or prejudice to the other party. As such, it depends on the factual matrix of each case as to where the justice of the case lies. (emphasis added)

E

[28] In fact, in *Silver Bird Group Bhd & Ors v. Dato' Tan Han Kook & Ors* (*supra*), despite the fact that the application to recall the witnesses was made after the trial, and at the stage where parties were preparing their written submission, the court had allowed the application.

F

[29] In resisting the application, counsel for the plaintiffs had relied heavily on the case of *Jong Chuk v. Chong Tung Sang & Ors; Bacom Enterprises Sdn Bhd (Third Party) (No 2)* (*supra*), as in that case, the court had dismissed the defendants' application to recall the plaintiff's witness which was made after they had already been cross-examined.

G

[30] In my view, the case of *Jong Chuk v. Chong Tung Sang & Ors; Bacom Enterprises Sdn Bhd (Third Party) (No 2)* is distinguishable as in that case, the High Court was of the view that the defendant, had, throughout the trial, been represented by 'competent counsel who had vigorously cross-examined all the witnesses for the plaintiff.' In this case, however, the witnesses had not

H

I

A been vigorously cross-examined. In fact, as indicated earlier, it was undisputed that there was a change in solicitors, and that the current solicitors for the defendants had only come on board in June 2019, after the defendants' seventh witness had given evidence. This led to a review of the case by the solicitors for the defendant. As such, it is my view that some
B allowance should be given to the solicitors for the defendants, bearing in mind the reminder administered by Gopal Sri Ram JCA (as he then was) in *Tan Kah Khiam v. Liew Chin Chuan & Anor*, that a litigant should not be penalised for any oversight or inattention of his counsel, and in this case, the defendants' previous solicitors.

C [31] The plaintiffs further contended that the prejudice that they would suffer if the application is allowed, is the inability of them to submit on the failure of the defendants to cross-examine.

[32] At this juncture, it is important to understand that the doctrine requiring the evidence of a witness to undergo the test of cross-examination is not necessarily the actual cross-examination, but merely an opportunity to exercise the right to cross-examine.
D

[33] This principle was restated by Muhammad Kamil Awang J in *Jong Chuk v. Chong Tung Sang & Ors; Bacom Enterprises Sdn Bhd (Third Party) (No 2)*:
E

Sarkar's Law Of Evidence, vol. 2, 14th edn at p. 1998 cited Lord Ellenborough LCJ in the case of *Cazenove v. Vaughan*, 1 M & S 6, wherein it says:

F The rule of the common law is that no evidence shall be admitted but what is or might be under the examination of both parties. But if the adverse party has had liberty to cross-examine and has not chosen to exercise it, the case is then the same in effect as if he had cross-examined. Here then the question is whether the defendant had an opportunity of cross-examining. The same rule is stated in Hals 3rd Ed Vol 15 para 800: '**No evidence affecting
G a party is admissible against that party unless the latter has had an opportunity of testing its truthfulness by cross-examination**'. ... (emphasis added)

[34] In my view, the issue of prejudice that the plaintiffs claimed they would suffer if the application was allowed was a non-starter, in view of the fact that the defendants did not have the opportunity to cross-examine the witnesses, to begin with, since the documents were not, at that time, in their knowledge or possession. The plaintiffs, therefore, would suffer no prejudice in real terms if this application was allowed.
H

I

[35] In the final analysis, the ultimate and overriding factor that has to be considered in the exercise of discretion, is the interest of justice. As was stated in *Chong Keat Realty Sdn Bhd v. Ban Hin Lee Bank Bhd* [2003] 3 CLJ 532, and reiterated numerous times in subsequent cases, the ‘courts are concerned with the dispensation of both procedural and substantive justice according to the merits of a given case.’

A

B

[36] I am also guided by the enlightening comments of David Wong Dak Wah J (as he then was) in *Kebing Wan & Anor v. Lembaga Pembangunan Dan Lindungan Tanah & Ors* [2012] 1 LNS 1026, that the ‘rules which govern procedures in court must never hamper or burden the court’s constitutional duty to dispense substantive justice. Procedural rules must never become the ‘master’ and must remain a ‘tool’ helping the judge to dispense substantial justice.’

C

[37] In this case, allowing this appeal to permit the defendants to recall the witnesses, will enable the court to strike a balance between both procedural as well as substantive justice, and it would allow the learned SCJ to analyse and examine the evidence in a comprehensive fashion before arriving at a conclusion on the defendants’ liability or the absence of it.

D

Conclusion

[38] After judicious consideration of all the evidence before this court, both oral and documentary, and submissions of counsel for both parties, I allowed this appeal, with no order as to costs, for the following reasons:

E

- (i) there were unforeseen circumstances that warranted allowing the application to recall the witnesses;
- (ii) the plaintiffs were neither prejudiced, nor was there any element of surprise to be guarded against;
- (iii) this was not tactical move by the defendants, and there was no ulterior motive to have a second bite at the cherry, or an attempt by the defendants to repair their case; and
- (iv) justice was dispensed to both parties as counsel for the defendants had agreed that he would not object to any similar application by the plaintiffs to call/recall any witness, provided that the calling/recalling of any such witness is to examine them on issues confined only to liability.

F

G

H

I